Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

Donald J. Farr; Gregory H. Ishmiel; Rod W. Tracy; Willis L. Radar; Joseph T. Dean; Robert Heuser; and Jeanette P. Neufeld,

Petitioners,

v.

US West, Inc.; the US West Management Pension Plan; and US West Communications,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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44/99

QUESTIONS PRESENTED

The Employee Retirement Security Act of 1974 (ERISA) provides that a civil action may be brought to obtain "appropriate equitable relief" to redress violations of ERISA. 29 U.S.C. §1132(a)(3).

If an Employer/Fiduciary has been found to have breached its fiduciary duties under ERISA by inducing plan participants to elect early retirement through misrepresentations:

1. May the court award back pay and/or front pay as forms of restitutionary "appropriate equitable relief" under 29 U.S.C. Section 1132(a)(3)?

2. May the Court order restorative relief such as reformation of the ERISA Plan to redress breaches of fiduciary duty as a form of "appropriate equitable relief" under ERISA?

3. Is status as a fiduciary (as opposed to a non-fiduciary) an appropriate circumstance to consider in determining the types of "appropriate equitable relief" which are available to redress violations of ERISA?

4. Are state law claims involving misrepresentations in an employer's offer of early retirement to employees, preempted by ERISA (29 USC Section 1144(a)) where the misrepresentations about possible income tax consequences of pension distributions are made in the employers capacity as settlor of the plan?

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PETITION FOR WRIT OF CERTIORARI

Petitioners hereby respectfully request a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

I OPINIONS BELOW

On June 15, 1998, the Ninth Circuit Court of Appeals entered its decision in Farr v. US West, Inc. 151 F.3d. 908 (9th Cir. 1998)(App."A", pp. 1-18) with Concurring Opinions at App."A", pp. 14-16). On November 18, 1998, the Ninth Circuit granted a Rehearing on the matter and presented three specific questions for additional briefing (App."D", pp. 24-24). On July 9, 1999, the Ninth Circuit issued an Order vacating the order dated November 18, 1998, denying the Petition for Rehearing and stating that a separate order amending the opinion of June 15, 1998 would be issued (App. "C", pp 21-22). On July 15, 1999, the Ninth Circuit issued an Order amending its opinion dated June 15, 1998 (App."B", pp. 19-20).

A prior opinion of the Ninth Circuit Court of Appeals in. Farr v. US West, Inc was reported at 58 F.3d. 1361 (1995). Previous opinions of the District Court dated were reported at 815 F. Supp. 1360 and 815 F.Supp. 1364 (D.Or. 1992).

II JURISDICTION

The Ninth Circuit Court of Appeals entered its opinion and affirmed the judgment on June 15, 1998, (App."A"). The Ninth Circuit initially granted Plaintiff's Petition for Rehearing on November 18, 1998 (App."D"). On July 9, 1999, the Ninth Circuit issued an Order vacating the order dated November 18, 1998, denying the Petition for Rehearing and stating that a separate order amending the opinion of June 15, 1998 would be issued(App. "C"). On July 15, 1999, the Ninth

Circuit issued an Order amending its opinion dated June 15, 1998 (App. "B"). The July 15, 1999 amendment related to the reasons for denying an award of back pay to Plaintiffs and relates directly to the substance of this Petition.

Petitioners seek review of the decision of the Ninth Circuit dated June 15, 1998 as modified by the Order Amending Opinion dated July 15, 1999.

The jurisdiction of this Court is invoked under 28 USC Section 1254(1).

III STATUTORY PROVISIONS INVOLVED

Questions Presented Nos. 1-3: Petitioners seek relief under 29 U.S.C. § 1132(a)(3) which reads, in pertinent part, as follows:

> "A civil action may be brought . . . (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms of the plan . . . ."

Question Presented NO. 4: Plaintiffs' have also sought relief under various state law claims with respect to the misrepresentations made by Defendants. The Ninth Circuit held that the state law claims were preempted by 29 U.S.C. Section 1144(a) which reads, in pertinent part, that ERISA "shall supersede . . . State laws" to the extent that those laws "relate to any employee benefits plan."

IV STATEMENT OF THE CASE.

A. Proceedings Below.

Generally, the Ninth Circuit held that Defendants' breached their fiduciary duties under ERISA. Further, the Ninth Circuit found that reinstatement of Petitioners to their prior employment was infeasible and that "appropriate equitable relief" did not include back pay, reformation of the plan or any compensatory relief against ERISA fiduciaries to redress the violations of ERISA. The Ninth Circuit also held that all state law claims relating to the misrepresentations were preempted by ERISA

Summary of Prior Proceedings:

1. **First District Court Summary Judgment:** In 1991, the United States District Court for the District of Oregon, District Judge Malcolm Marsh granted summary judgment for the Respondents with respect to all claims. The District Court held that ERISA preempted all state law claims, that Plaintiffs could not bring individual claims for fiduciary breach under ERISA, no breach of fiduciary duty occurred and that the relief requested was not available under 29 USC Section 1132(a)(3). Plaintiffs appealed to the Ninth Circuit Court of Appeals.

2. **First Ninth Circuit Decision:** The Ninth Circuit affirmed the District Court's decision granting summary judgment for the Respondents on the ERISA breach of fiduciary duty claim and reversed the District Court, with respect to the issue of ERISA preemption of the state law claims. The Court of Appeals held that the state law claims relating to the misrepresentations concerning possible tax consequences were not preempted by ERISA as they

did not "relate" to the Plan because they did not arise out of the administration of the Plan.

3. **District Court Summary Judgment after Remand:** Upon remand to the District of Oregon, District Judge Malcolm Marsh again granted summary judgment for the Respondents. Judge Marsh did not follow the Ninth Circuit's mandate of remand because he believed the Supreme Court's decision in Varity Corp. v. Howe, 516 US 489, 116 S.Ct. 1065, 134 L.Ed. 2d. 130 (1996), altered the preemption analysis. After considering Varity, the district Court again held that Plaintiffs' state law claims were preempted by ERISA, that no breach of fiduciary duty occurred and that the requested remedies were not available under ERISA. Plaintiffs again appealed to the Ninth Circuit Court of Appeals.

4. **Second Ninth Circuit Decision:** On June 15, 1998, the Ninth circuit reversed the district Court by finding that the Defendants breached their ERISA fiduciary duties to Plaintiffs. The Ninth Circuit, however, again affirmed the District Court with respect to the ERISA preemption of the state law claims and also held that Plaintiffs had no remedy under ERISA for the breach of fiduciary duty.

5. **Modification of Ninth Circuit Decision:** Following a Petition for Rehearing and a Motion for Reconsideration and Clarification, the Ninth Circuit, on July 15, 1999, amended its earlier opinion date June 15, 1998, by clarifying the reasons for denying back pay and front pay as forms of appropriate equitable relief.

B. Statement of Facts.

Plaintiffs were long-term employees of Defendants US West, Inc. and US West Communications. In January 1990, plaintiffs elected to retire under an amendment to the US West Management Pension Plan known as the 5+5 Program that created early retirement incentives for many long-term employees. As part of the election to retire early, plaintiffs elected to receive benefits under the 5+5 Program including an election to receive their accrued pension benefits in the form of a lump sum distribution. Based upon the materials provided by Defendants indicating that the lump sum option offered significant tax advantages, Plaintiffs believed that the entire amount of the lump sum distributions could be rolled-over into an (Individual Retirement Account (IRA) on a tax-deferred basis. The Ninth Circuit stated that the information that had been provided by the Defendants failed to include an explanation of the possible adverse tax consequences known to the Defendants or an explanation of who might be adversely affected by the tax limitations.

The Ninth Circuit found that Defendants, as plan fiduciaries, were well aware of the adverse tax impact on some employees and made a deliberate decision not to disclose this information to the employees. After US West had informed employees that electing the lump sum payments might "offer significant tax advantage," US West officials knew that there would be significant adverse tax consequences to some of those who elected the lump sum distribution. The US West officials discussed the issue and affirmatively decided to withhold the information from plan beneficiaries. The Ninth Circuit found that the Defendants provided incomplete and misleading information about the potential tax consequences of accepting the 5+5 Program retirement option with the lump sum distribution.

The Ninth Circuit also specifically found that one of the reasons the Defendants excluded the information about the adverse tax issues was to save money for the

Defendants.

The Ninth Circuit concluded: "Defendants' failure to inform Plaintiffs about the potential tax consequences of lump sum distributions constitutes a breach of their fiduciary duties, which caused individual harm to the Plaintiffs who suffered adverse tax consequences."

While finding that Defendants breached their fiduciary duties to Plaintiffs under ERISA, the Ninth Circuit also concluded that **no** "appropriate equitable relief" was available under 29 U.S.C. Section 1131(a)(3) and that all state law claims against the employer were pre-empted.

The types of relief considered by the Ninth Circuit and rejected as unavailable under 29 USC Section 1132(a)(3) were as follows:

(1) The Court held that reinstatement of the employees to the positions held when they elected early retirement in 1990 was infeasible and not possible after such a substantial passage of time. Petitioners do not dispute that after nearly nine years of litigation to establish that Defendants breached their fiduciary duties to Plaintiffs, reinstatement is no longer feasible.

(2) The Court held that because reinstatement was not possible, back pay (and/or front pay) would not be an "equitable remedy" under these circumstances. The Court stated that because reinstatement was not a viable alternative given the amount of time that has passed since Plaintiff's left the company, Plaintiffs' request for front and back pay is "moot." Petitioners disagree with the characterization of the issue as "moot." The

Court should have determined whether front and/or back pay are forms of "appropriate equitable relief".

(3) The Court considered but rejected restorative relief, such as a direction to the Plan administrator to reform the terms of the '5+5' Program to lessen or eliminate the 'excess' tax liability of employees who elected early retirement with the lump sum distribution option.

(4) The Court held that no form of compensatory relief was available with respect to any breach of duty by an ERISA fiduciary.

The decision of the three judge Ninth Circuit panel contained two Concurring Opinions.

The Concurring Opinion of Circuit Judge Noonan stated that existing Ninth Circuit precedent compelled the decision (i.e. no available equitable remedy). The concurring opinion, however, appeared to question the validity of existing Ninth Circuit precedent which limits the scope of traditional remedies against breaching fiduciaries, as follows:

> "When it is a fiduciary that has breached its trust, of course the remedy must be equitable. What else could a court making a trustee true to its trust be doing except providing equitable relief?"
>
> • * * * *
>
> "If we are unable to do equity here, I agree with Judge Hawkins that Congress should right the wrong."

Judge Noonan also stated his belief that the circuit should grant *en banc* review to distinguish Mertens v. Hewitt Assoc. 508 U.S. 248, 113 S.Ct. 2063, 2068-2069, 124

L.Ed.2d 161 (1993) on the basis that Mertens dealt with a non-fiduciary and this case involved a breach by a fiduciary.

A second Specially Concurring Opinion was written by Circuit Judge Hawkins who stated that the actions of the Defendants "represented a gross violation of fiduciary duty." Judge Hawkins noted the apparent inconsistency between this Court's statement in Varity Corp. v. Howe, 116 S.Ct. 1065 (1996), that "it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy" and the Ninth Circuit's restrictive interpretation denying all remedies for such a breach based upon this Court's decision in Mertens v. Hewitt Assocs., 508 U.S. 248, 255 (1993).

Judge Hawkins concluded that "this case so aptly demonstrates [that], perhaps, Congress should rethink the limited remedies provided in [ERISA] Section 502 and afford a greater range of relief to beneficiaries when a fiduciary so clearly breaches its duties."

C. Basis Of Federal Court Jurisdiction.

This action was brought under 29 U.S.C. Section 1132(a)(3). The Federal Courts have exclusive jurisdiction of civil actions brought under ERISA. 29 U.S.C. Section 1132(e)(1).

V. REASONS FOR GRANTING THE PETITION

A. Introduction.

This Court should grant the Petition to decide the circumstances, if any, in which traditional equitable remedies such as restitution (including back and front pay), reformation and other types of monetary relief apply to employer/fiduciaries who have been found to have engaged in "gross violations" of their duties under ERISA.

Without a uniform standard, the availability of traditionally equitable remedies for breach of an ERISA fiduciaries' duty is subject to confusing interpretations and unpredictable results. It has been 25 years since the enactment of ERISA and the scope of the remedies available as "appropriate equitable relief" to remedy **fiduciary** breaches remains unresolved. Because of the lack of a uniform standard, courts have applied similar remedies in different manners.

In this case, the Ninth Circuit considered and rejected several possible equitable remedies including reinstatement, back, front pay, reformation, restitution and a surcharge of the fiduciary, all based upon its interpretation of this Court's decision in Mertens v. Hewitt Assoc., and existing Ninth Circuit precedents.

B. Conflict Between the Circuits.

The Ninth Circuit stated that back pay without rescission and front pay were not considered to be "an equitable remedy in these circumstances" because reinstatement was no longer a feasible alternative. The Ninth Circuit specifically noted that its decision conflicted with the decision of the Sixth

Circuit in Schwartz v. Gregori, 45 F.3d. 1017, 1021-23 (6th Cir. 1995)(back pay and front pay were allowed in ERISA claim in which reinstatement was found to be infeasible.

The Sixth Circuit's decision in Schwartz v. Gregori and the Ninth Circuit's decision in Farr v. U.S. West (See App. A), are in direct conflict and both are based upon the respective Circuit's interpretation of the Mertens decision.

In Schwartz v. Gregori, the plaintiff was found to have been involuntarily discharged from employment in violation of ERISA. The court also found that reinstatement was not a feasible remedy in light of the hostility between the parties. The question on appeal was the relief available under 29 USC Section 1132(a)(3) for a former employee who had been discharged in violation of ERISA. The Sixth Circuit specifically considered the "question in light of Mertens . . . whether back pay and front pay are equitable or legal remedies."

The Sixth Circuit found that back pay was a form of restitution and therefore a remedy expressly recognized by Mertens as equitable. Relying upon the reasoning of Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed.2d. 323 (1960), the Sixth Circuit considered the following factors in determining that the back pay remedy was a form of restitution and therefore equitable relief:

1. The back pay at issue was awarded against the employer (rather than a third party) and operated to restore the plaintiff that which would have been enjoyed but for the employer's illegal conduct;

2. While restitution generally is awarded to

prevent unjust enrichment to the defendant, this is not required in every case;

3. It is not necessary that restitution be made in kind, for a court may restore the plaintiff to the position he formerly occupied either by the return of something which he formerly had or by the receipt of its equivalent in money.

The Sixth Circuit went on to conclude that the court's historical assessment of the nature of front pay was that it was an equitable remedy which was awarded only when the preferred remedy of reinstatement (stated to be indisputably an equitable remedy) was not appropriate or feasible. Because front pay was an equitable remedy it was concluded that it was available under 29 USC Section 1132(a)(3).

In Farr v. US West, the employees were induced through misrepresentations by their employers to elect early retirement from their long-term employment with the Defendants. The Defendants were ERISA fiduciaries and their deliberate failure to provide information regarding possible adverse tax consequences to Plaintiffs was found by the Ninth Circuit to have violated ERISA. One of the reasons the Defendants knowingly withheld information from the Plan beneficiaries was to save the employer money at the beneficiaries' expense. Reinstatement was not considered to be appropriate equitable relief because it was no longer feasible.

Had the Ninth Circuit applied the factors from Mitchell v. Robert DeMario Jewelry, Inc., which the Sixth Circuit considered in Schwartz v. Gregori, The Ninth Circuit should have concluded that back pay

and front pay were restitutionary remedies that are expressly recognized by Mertens as equitable. Specifically, the back pay would have been awarded against the employer (rather than against a third party) and would operate to restore to the plaintiffs the salaries and benefits which they would have enjoyed but for the fact that they were induced through illegal misrepresentations to elect early retirement. In this case, back pay would also prevent unjust enrichment to Defendants because one of the purposes of the 5+5 Program was to reduce the number of employees on the payroll and thereby save money. Defendants were unjustly enriched through the savings in salary and benefits expenses for those employees who were illegally induced to elect early retirement because of the misrepresentations. Since it has been found that restitution through reinstatement is no longer possible, restitution should be made available through the receipt of its equivalent in money (i.e. back pay). The court in its discretion could also award front pay until each of the plaintiffs would have reached normal retirement age.

Rather than apply the reasoning adopted in Schwartz v. Gregori and Mitchell v. Robert DeMario Jewelry, Inc. to determine whether back pay was an equitable remedy, the Ninth Circuit, without citation of authority, adopted its own test and a conflicting result. The Ninth Circuit ignored the question of whether back pay was a form of restitutionary relief expressly approved under Mertens. Instead, the Court reasoned that because reinstatement (with equitable rescission of the election to retire) was not possible an award of back pay without equitable rescission would not be an equitable remedy. The question of whether the election to retire may have been illegally induced through the deliberate misrepresentation of the employer was not taken into account in the decision.

The Ninth Circuit did not consider whether the request for front pay was equitable relief and reached a contrary result to that reach by the Sixth Circuit in Schwartz v. Gregori.

It must be noted that Schwartz v. Gregori involved a retaliatory discharge in violation of 29 USC Section 1140 whereas Farr v. US West involve a violation of the duty of loyalty under 29 USC Section 1104(a). However, both Section rely on 29 USC 1132(a)(3) and the phrase "appropriate equitable relief" to determine the available remedies. The type of ERISA violation (i.e. Section 1104 or Section 1140) that causes the plan participant to lose or give up their career does not appear to be relevant in determining the types of equitable relief available under Section 1132(a)(3).

The Ninth Circuit's conclusion that Plaintiff's requests for back pay and front pay are rendered moot also conflicts with the reasoning and conclusion of the Sixth Circuit in Schwartz v. Gregori. The relevant Ninth Circuit statement is as follows:

> "Because reinstatement is clearly not a viable alternative in the present case, given the amount of time that has passed since Plaintiffs left the company, we need not decide whether reinstatement would be available under [29 USC Section 1132(a)(3)]. That conclusion, in turn, renders Plaintiffs' request for front and back pay moot. Thus we affirm the district court's conclusion that reinstatement would not be an appropriate remedy." (See App."A" at p.14 and App. "B").

The Ninth Circuit found that given the amount of time that has passed since Plaintiffs' left the company, reinstatement is not feasible and therefore it is not an appropriate remedy. Petitioners do not

seek review on the issue of the feasibility of reinstatement because of the length of time that has elapsed since Plaintiffs retired and this litigation began. This finding simply means that reinstatement cannot be "appropriate equitable relief" under Section 1132(a)(3) and is therefore not an available form of relief. Such a conclusion does not render the issue of reinstatement "moot" and in turn does not render Plaintiffs' requests for front and back pay "moot." The Sixth Circuit stated that reinstatement was indisputably an equitable remedy but authorized back pay and front pay where reinstatement was not appropriate or feasible. The Ninth Circuit should have at least considered the merits of whether such remedies were available under 29 USC Section 1132(a)(3)..

The Ninth Circuit cites no authority for its unique position that back and front pay requests are "moot" when reinstatement is not possible. Such a conclusion is grossly "inequitable" because it rewards a fiduciary in breach of its duties for dragging out the litigation process to totally escape all liability by eventually rendering reinstatement, back pay and front pay "moot." If simple delay can be used as the basis of eliminating liability, the equitable maxim that "equity shall suffer no wrong without a remedy" will be rendered meaningless. The Ninth Circuit's precedent which fails to determine if back pay, front pay and reformation are forms of equitable relief and therefore rewards delay by a breaching fiduciary is an affront to the traditions of equity and should be reviewed by this Court.

C. Related Questions:

Question Presented #2: Question 2 has

been included because the Ninth Circuit requested briefing on the availability of restorative relief including reformation of the ERISA plan as a form of equitable relief. After briefing by the parties, the Ninth Circuit rejected the option of granting restorative relief or reformation without specific comment. Petitioners submit that reformation of the Plan is a form of "appropriated equitable relief" which should have been formally considered by the Ninth Circuit and that guidance concerning when such restorative relief would be appropriate to ensure uniform standards among the circuits.

In Armistead v. Vernitron Corp. 944 F.2d. 1287, 1295 (6th Cir. 1991) the Sixth Circuit affirmed an order requiring reformation (as an acceptable form of equitable relief) of an ERISA summary booklet because it did not reflect the agreement of the parties. The Ninth Circuit did not discuss why it rejected reformation of the 5+5 Program as a form of appropriate equitable relief. The availability of the remedy of reformation should be reviewed by this Court to determine whether it may be a form of appropriate equitable relief to redress violations of an ERISA fiduciaries duties to plan participants.

Question Presented #3: It is only necessary for the Court to consider Question 3 if it is determined that back pay, front pay and reformation do not provide adequate relief or are not appropriate forms of equitable relief in this case. In Mertens, this Court stated that the phrase "appropriate equitable relief" "remains a question of interpretation in each case which [broad or narrow interpretation] meaning is intended." It was further stated that the Mertens decision only affected the potential joint liability of persons who had no real power to control the plan (i.e. non-fiduciaries). Since the question presented in Mertens involved only a **non-fiduciary**, the question

remains whether a narrow interpretation of the available forms of relief is also appropriate to redress violations by ERISA **fiduciaries**. In his Concurring Opinion, circuit Judge Noonan stated that he believed the Ninth Circuit should distinguish this case from Mertens because of the differences between allegations against a non-fiduciary and a fiduciary breach.

Question Presented #4: The fourth question presented for review (ERISA preemption) has been included because it relates to the overall scheme of ERISA and the need for uniform standards. The confusion is this area is evident from the conflicting views on this question between the 1995 Ninth Circuit decision and the 1998 decision. Basically, in 1995, the Ninth Circuit held that the statements concerning possible tax consequences did not "relate" the ERISA Plan and therefor were not preempted. In the 1998 decision, the Ninth Circuit following, Varity Corp. v. Howe, 516 U.S. 489 116 S.Ct. 1065, 134 L.Ed.2d 130 ,held that because the tax consequences of the 5+5 Program are part of the overall mix of information relied upon by Plaintiffs' in making their decisions to participate in the plan, they also "relate to" plan administration.

Varity did not consider or decide whether all misrepresentations made by an employer acting in dual capacities preempted by ERISA if the information is part of the overall mix but includes information about an ERISA plan. In this case, the misrepresentations about possible tax consequences involving the lump sum distributions were made by corporate officials of Defendants in the context of communicating the 5+5 Program early retirements offer to employees. The information was not made as part of the normal administration of the ERISA governed pension plan.

Varity held that employer provided information that was part of the overall mix must be provided in a manner consistent with any ERISA fiduciary obligations of the Employer. The reasoning was that if dual capacities of employer and fiduciary existed, the plan beneficiaries were entitled to infer that the information provided was subject to fiduciary standards. However, Varity was not a preemption case and the question of whether all information that is included in the overall mix of information is preempted when it is made in capacity as employer and violates state laws governing misrepresentations.

The ERISA preemption issue involving misrepresentations made by the employer was not answered by Varity and remains unresolved.

D. Timeliness of the Issues:

In the Specially Concurring Opinion by Judge Hawkins, it was suggested that Congress should review the statutory language with respect to the ". . . range of relief provided to beneficiaries when a fiduciary so clearly breaches its duties." Judge Noonan, in his Concurring Opinion, agreed that "Congress should right the wrong" in the courts were unable to do equity. However, it is not an economical use of resources for Congress to "rethink" the statutory language until this Court has resolved the conflict with the Sixth Circuit and had the opportunity to more fully interpret the phrase "other appropriate equitable relief" in the context of a **fiduciary** breach. Before Congress "rethinks" the scope of remedies available under ERISA as suggested by Judges Noonan and Hawkins, this Court should first expressly review the scope of "appropriate equitable relief" in a case involving a **fiduciary** breach.

It should be noted that Congress is presently considering legislation known as the "Patients Bill of Rights" (Senate Bill 6) and the Bipartisan Concensus Managed Care Improvement Act (HR 2723) which would modify the ERISA preemption of state laws to allow individuals to bring an action under ERISA against an HMO for damages. Also, the state of Texas has enacted legislation which attempts to permit patients to by-pass the ERISA preemption provision and bring state law claims directly against HMO's for malpractice relating to treatment decisions. See: Section 88.002 of the Texas Civil Practice and Remedies Code. Since one of the objectives of ERISA was to promote uniformity in the administration of employee benefit plan, it would seem that a decision by this Court on the important question of remedies available for fiduciary breaches might promote uniformity and make such piecemeal changes unnecessary.

VII. CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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October 1999

APPENDIX "A"

U.S. 9th Circuit Court of Appeals

DONALD J. FARR; GREGORY H. ISHMIEL; ROD W. TRACY; WILLIS L. RADER; JOSEPH T. DEAN; ROBERT HEUSER; JEANETTE P. NEUFELD, Plaintiffs/Appellants, v. U.S. WEST, INC.; US WEST COMMUNICATIONS, INC.; US WEST MANAGEMENT PENSION PLAN; U.S. WEST EMPLOYEE'S BENEFIT COMMITTEE, Defendants/Appellees.	No. 96-36051 D.C. Nos. CV-91-1186 MA (Lead Case) CV-92-330 MA CV-92-485 MA (Consolidated Cases) OPINION

Appeal from the United States District Court
for the District of Oregon Malcolm F. Marsh, District Judge, Presiding

Argued and Submitted
November 5, 1997--Portland, Oregon

Filed June 15, 1998

Before: John T. Noonan and Michael Daly Hawkins, Circuit Judges, and Robert R. Merhige, Jr.,* District Judge.

Opinion by Judge Merhige; Concurrence by Judge Noonan; Concurrence by Judge Hawkins

COUNSEL

Leslie L. Wellman, Portland, Oregon, for the appellants.

D. Ward Kallstrom, Lillick, McHose & Charles, San Francisco, California, for the appellees.

OPINION

MERHIGE, District Judge:

This case arises under ERISA, the Employee Retirement Income Security Act of 1974, 29 U.S.C. S 1001, et seq. Seven former employees of U.S. West, Inc. appeal the district court's summary judgment dismissal of their action alleging that U.S. West breached its fiduciary duties under ERISA by misrepresenting facts relating to the tax consequences of an early retirement program, providing misleading or incomplete information about potential adverse tax consequences, and failing to allow the employees to rescind their early retirement. On remand from Plaintiffs' prior appeal, the District Court granted summary judgment for Defendants, holding the following: Plaintiffs' state law claims are preempted by ERISA; individual relief is available under ERISA; Defendants did not breach their fiduciary duties to Plaintiffs; assuming arguendo, that Defendants did breach their fiduciary duties, Plaintiffs were not damaged thereby; and the monetary damages sought by Plaintiffs are not recoverable as "other appropriate equitable relief" under ERISA S 502(a)(3), 29 U.S.C. S 1132(a)(3). We hold the following: in light of Varity Corp v. Howe, 116 S. Ct. 1065 (1996), Plaintiffs' state law claims are preempted by ERISA; and although Defendants breached their fiduciary duties to Plaintiffs, the damages Plaintiffs seek are nonetheless not recoverable as "other appropriate equitable relief" under ERISA S 502(a)(3), 29 U.S.C. S 1132(a)(3). Thus, we affirm in part, reverse in part, and affirm the judgment.

I.

Plaintiffs were long-term employees of Defendants US West, Inc. and US West Communications. In January 1990, Plaintiffs chose to retire under an amendment to the US West Management Pension Plan known as the "5 + 5 program," which created early retirement incentives for many long-term employees. Under the 5 + 5 program, Plaintiffs chose to receive their accrued pension benefits in a lump sum. Plaintiffs allege that US West did not tell them that those lump sum distributions in excess of the amount qualified to be rolled over into Individual Retirement Accounts ("IRAs") would be taxed immediately.

On Dec. 15, 1989, J. Thomas Bouchard, Senior Vice President and Chief Human Resources Officer at US West, sent a letter to employees eligible to retire under the 5 + 5 program. Attached to the letter was a 15-page booklet providing an overview of the program. The booklet included a section entitled "Tax Considerations Affecting Choice of Distribution" which purported to "highlight[ ] the basic federal tax rules" relevant to the choice between taking the pension benefits in a lump sum or in a series of monthly installments. The booklet warned plan participants that the tax consequences of the available options were "very complex" and that employees "should consult with your tax advisor." For those who were not age 50 before 1986, the booklet provided the following information on lump sum distributions: "Distribution fully included in taxable income received except to the extent rolled over to another IRS-qualified plan or IRA within 60 days." For those who were age 50 before 1986, the booklet provided the following information on lump sum distributions: "All or part of [lump sum] distribution may be rolled over to another qualified plan or an IRA within 60 days without any current tax liability." The booklet did not say that only qualified portions of the lump sum distributions could be rolled over, and that everything else would be taxed.

The Dec. 18, 1989 issue of US West Today, a publication

circulated to US West employees, contained an interview with Charles Kamen, the Executive Director of Human Resources for US West, with the heading "Lump-Sum option clarified." In response to questions regarding the tax consequences of the lump sum option, Kamen stated, "Obviously, the lump-sum payment will provide you with a large amount of money that you can control and invest however you like. For some, the lump sum may also offer significant tax advantages."

On Jan. 17, 1990, several Pension Plan representatives and US West managers participated in a live telecast presentation concerning the 5 + 5 program broadcast to eligible employees. The telecast featured a panel of US West officers and upper management employees. Before the telecast aired, two of the panelists discussed the possibility of disclosing the potential tax problems with lump-sums that could not be rolled over into IRAs, but decided to withhold this information. During the broadcast, Kamen mentioned that a "qualified portion of the lump-sum distribution" could be rolled over into an IRA, but did not explain what he meant by "qualified portion."

Each of the Plaintiffs retired under the 5 + 5 program, elected to receive their accrued benefits in lump sums, attempted to roll over all of their lump sums into IRAs, but discovered that only qualified portions of those sums could be rolled over, and the rest was promptly taxed. On Feb. 6, 1990, after US West management realized that a significant number of people were in this predicament, it held a meeting to discuss possible responses. The plan actuary suggested reducing the discount rate from 8% to 5.25% on the excess portion of the lump sum to mitigate unfavorable tax consequences. The US West Employees' Benefits Committee adopted this proposal.

Plaintiffs subsequently submitted claims to the Plan for additional benefits to offset their unexpected tax liability. The Benefits Committee denied their claims.

Plaintiffs allege that US West breached its fiduciary duty to them under ERISA S 404 by providing them with incomplete, false, and misleading information regarding the tax consequences of their lump sum distributions.1 Plaintiffs additionally sued US West under Oregon state law for, inter alia, fraud and negligent misrepresentation.

II.

On the first hearing of the case, the district court awarded US West summary judgment on both the ERISA and the state law claims. First, the district court held that even if US West had breached a fiduciary duty to Plaintiffs, Plaintiffs would not be entitled to the relief they sought because ERISA does not provide for individual recovery for breaches of fiduciary duties. Farr v. U.S. West, Inc., 815 F. Supp. 1364, 1374-75 (D. Or. 1992). The district court also held that, even if US West had a fiduciary duty to Plaintiffs, it had not breached that duty in this case. The court further held that the lost tax benefits sought by Plaintiffs are extra-contractual damages which are not "other appropriate equitable relief " authorized under ERISA S 502(a)(3), 29 U.S.C. S 1132(a)(3). Id. At 1373-76. Finally, the district court held that Plaintiffs' state law fraud and negligent misrepresentation claims were preempted by ERISA. Id. at 1363.2

Plaintiffs appealed both the preemption ruling and the grant of summary judgment for Defendants. On appeal, we took the following actions: reversed the district court's decision that Plaintiffs' state law claims are preempted by ERISA, holding that the alleged misrepresentations did not "relate to" the Pension Plan; affirmed the district court's entry of judgment for Defendants on the ERISA claim on the ground that ERISA precluded an individual claim for relief for breach of fiduciary duty; did not address the district court's factual findings that Defendants did not breach their fiduciary duties; and did not address the district court's conclusion that the tax benefit losses sought by Plaintiffs are not recoverable under ERISA S 502(a)(3), 29 U.S.C. S 1132(a)(3). Farr v. U.S. West, Inc., 58 F.3d 1361 (9th Cir. 1995).

After remand, the parties filed cross-motions for summary judgment and briefed the issue of whether Varity Corp. v. Howe, 116 S. Ct. 1065 (1996), decided after we had remanded the case, required re-examination of this Court's mandate. On September 3, 1996, the district court took the following actions: granted Defendants' motion for summary judgment on Plaintiffs' state law claims, holding that the state law claims were preempted by ERISA under the reasoning of Varity; stated that pursuant to Varity, beneficiaries may seek individual relief pursuant to ERISA's SS 1109 and 1132(a)(3); and granted summary judgment for Defendants on Plaintiffs' fiduciary breach claim under ERISA based on its previous determination that Defendant had not breached its fiduciary duties.3

We review to determine whether (1) Varity negated this Court's mandate on remand that ERISA does not preempt the former employees state law claims; (2) Defendants breached their fiduciary duties under ERISA by not informing the employees about the potential tax consequences of lump sum distributions; and (3) the remedies sought by the Plaintiffs are available under ERISA S 502(a)(3), 29 U.S.C.S 1132(a)(3).

III.

[1] ERISA S 514(a) preempts state law claims that "relate to" employee benefit plans. See 29 U.S.C.S 1144(a). A state law claim "relates to" an employee benefit plan if it has a connection with or reference to such a plan. See California Div. Of Labor Standards Enforcement v. Dillingham Constr., Inc., 117 S. Ct. 832, 837 (1997). In the first appeal, we held that Plaintiffs' state law claims for breach of contract, fraud, and misrepresentation did not "relate to" the Plan because the alleged misrepresentations did not arise out of Plan administration, but were made by US West in its employer capacity and thus, were not preempted by ERISA. See Farr , 58 F.3d at 1366-67. The district court did not follow this mandate on remand because it believed that the Supreme

Court's decision in Varity, which expanded the parameters of "plan administration," altered our preemption analysis. After considering Varity, the district court again held that Plaintiffs' state law claims were preempted by ERISA.

[2] Whether ERISA preempts state law is a question of law reviewed de novo. See Velarde v. PACE Membership Warehouse, Inc., 105 F.3d 1313, 1316 (9th Cir. 1997). We agree with the district court's reasoning regarding the impact Varity has on ERISA preemption analysis. Our previous conclusion that the Defendants' statement regarding the tax consequences of plan benefits did not relate to plan management was premised upon a narrower understanding of plan management than that articulated by the Supreme Court in Varity. Under the Court's reasoning in Varity, the tax consequences of the 5 + 5 plan clearly "relate to" plan administration because they are part of the overall mix of information relied upon by Plaintiffs in making their decisions to participate in the plan. Thus, we affirm the district court's conclusion that Plaintiffs' state law claims are preempted pursuant to S 514(a).

IV.

The district court granted summary judgment to Defendants, holding that Defendants had not breached their fiduciary duties under ERISA. A grant of summary judgment is reviewed de novo. See Covey v. Hollydale Mobilehome Estates, 116 F.3d 830, 834 (9th Cir. 1997); see also Williams v. Cater-pillar, Inc., 944 F.2d 658, 661 (9th Cir. 1991)(holding the de novo standard of review of summary judgment on appeal applies as much to an ERISA action as to any other civil action). Our review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c). See Ghotra v. Bandila Shipping, Inc., 113 F.3d 1050, 1054 (9th Cir. 1997). We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. See Covey, 116 F.3d at 834.

[3] ERISA requires a "fiduciary " to "discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries." ERISA S 404(a), 29 U.S.C. S 1104. Although the Supreme Court in Varity declined to reach the question of whether ERISA imposes a duty on fiduciaries to disclose truthful information on their own initiative, or in response to employee inquiries, 116 S. Ct. at 1075, we have previously held that a "fiduciary has an obligation to convey complete and accurate information material to the beneficiary's circumstance, even when a beneficiary has not specifically asked for the information." Barker v. American Mobil Power Corp., 64 F.3d 1397, 1403 (9th Cir. 1995) (citation omitted). Defendants' failure to explain to Plaintiffs in either written or verbal communications the potentially negative tax consequences they might face by choosing to participate in the 5 + 5 retirement plan was a breach of Defendants' fiduciary duties.

For example, the December 18, 1989 booklet, "Supplement to the Summary Plan Description" (SSPD), and the "Summary of Material Modification" to the Plan failed to include facts known to Defendants about the possible adverse tax consequences relating to lump sum distributions. The booklet also stated that "[a]ll or part" of the lump sum distribution could be rolled over into an IRA without current tax liability. The booklet failed to include an explanation that only qualified portions of the lump sum distributions could be rolled over without incurring current tax liability and an explanation of who might be adversely affected by the limitation. These omissions in the summary plan description were misleading for employees making the important decision of whether to exercise the 5 + 5 retirement option, and therefore, violate ERISA's requirement that "[t]he format of the summary plan description must not have the effect to misleading, misinforming or failing to inform participants and beneficiaries." 29 C.F.R. S 2520.102-2(b).

The December 18, 1989 issue of US West Today contained an interview with Kamen under the headline "lump-sum

option clarified," which stated that "[f]or some, the lump sum may also offer significant tax advantages." The article did not clarify that for others the lump sum would present significant tax disadvantages. A January 15, 1990 issue of US West Today contained an extensive discussion of the 5 + 5 program, including information about the way the lump-sum benefit was calculated. The article contained no mention of the Internal Revenue Code S 4154 problem or the adverse tax consequences. In a January 17, 1990 live in-house television broadcast intended to explain the 5 + 5 offer to employees, panelists decided beforehand to withhold the potential tax problems with lump sums. In that telecast, Kamen stated that a "qualified portion of the lump-sum distribution " could be rolled over into an IRA, but failed to explain what he meant by "qualified portion."

As the district court noted, Defendants do not dispute that there was no information provided explaining the S 415 limitations on the portions of lump sum distributions that were eligible to be rolled over to another qualified plan or an IRA without current tax liability, even though they were well aware of the adverse impact S 415 would have on some employees. Kamen, an employee of US West, confirmed that a deliberate decision was made to leave the information out to avoid "confusing" the issues for other employees.

[4] The record shows that one of the reasons the Defendants excluded the information about the S 415 limitations was to save money. A report written in November 1989 indicated that it would be costly to the company to provide such information, and estimated that 690 employees would receive amounts exceeding S 415 limitations. This, of course, is not a valid justification for withholding information. As the Supreme Court stated in Varity, "to participate knowingly and significantly in deceiving a plan's beneficiaries in order to save the employer money at the beneficiaries' expense, is not an act `solely in the interests of the participants and beneficiaries.' " Varity, 116 S. Ct. at 1074.

Defendants argue that they fulfilled their fiduciary duties

by advising participants on several occasions, including in the summary plan description, to consult with a tax advisor because of the complexity of the tax consequences. We agree that the Benefits Committee did not have a duty to provide Plaintiffs with individualized notice of all the ways the tax laws would impact each of their individual distributions. As we have noted, "to require summary plan descriptions to discuss the application of general rules to a wide range of particular situations and thereby provide specific advice to employees on how to shape their conduct to fit the rules, would undermine the statute. . . ." Stahl v. Tony's Bldg. Materials, Inc., 875 F.2d 1404, 1408 (9th Cir. 1989). "A summary plan description, therefore, cannot violate ERISA merely because it could have included language more specifically discussing the precise situation of a particular beneficiary." Id.

[5] However, although we have held that it is enough if an employee is alerted "to recognize that certain events or actions could trigger a loss of benefits," id., Defendants failed to provide sufficiently detailed information to employees to alert them of the precise nature and likelihood of such a possibility. For Plaintiffs to be sufficiently on notice that the potential adverse tax consequences would affect them, Defendants had an obligation to explain the nature of the potential problem and, in general terms, who might be negatively affected. For example, Defendants should have explained to employees the difference between excess lump sum benefits that cannot be "rolled over" into IRAs and are therefore subject to immediate taxation and qualified benefits which can be "rolled over" without immediate taxation. Defendants' fiduciary duties also required them to explain more specifically what categories of employees would be likely to be affected by the S 415 limitations, such as employees expecting larger amounts of financial benefits. With this information, individual employees would be alerted that they themselves might face adverse tax consequences and could make informed decisions about whether they needed to seek professional tax advice.

[6] In sum, the ERISA fiduciary duty includes the common law duty of loyalty, which requires fiduciaries to deal fairly and honestly with beneficiaries. See Varity, 116 S. Ct. at 1075. Defendants had a duty to provide thorough and accurate information explaining the 5 + 5 retirement option that it offered to entice employees to retire. Instead, Defendants provided incomplete and misleading information about the potential tax consequences of accepting that option. Given the expanded notion of the fiduciary duties of plan administrators articulated by the Supreme Court in Varity, we conclude that Defendants' failure to inform Plaintiffs about the potential tax consequences of lump sum distributions constitutes a breach of their fiduciary duties, which caused individual harm to the Plaintiffs who suffered adverse tax consequences.

V.

[7] Although Defendants breached their fiduciary duties and Plaintiffs were damaged thereby, no remedy is available to Plaintiffs under ERISA. Plaintiffs seek the following remedies for the alleged damage caused by US West's breach of its fiduciary duties: (a) a surcharge equal to all the taxes they have paid and will pay on their excess benefit distributions; (b) reinstatement with back and front pay; (c) punitive damages; and (d) prejudgment interest and attorneys' fees. Plaintiffs assert that these remedies are among those permitted under section 502(a)(3) of ERISA, 29 U.S.C. S 1132(a)(3).

Plaintiffs' claim arises under section 404 of ERISA, 29 U.S.C. S 1104. That section enumerates the affirmative duties of a plan fiduciary, and section 409, 29 U.S.C.S 1109, provides for liability for any breach of those fiduciary duties. ERISA S 502, 29 U.S.C. S 1132, provides the remedial provisions of ERISA and outlines the causes of action which may be maintained by plan participants and actions subject to enforcement by the Department of Labor. Section 502(a) is divided into three categories. The first category, a claim for benefits under 502(a)(1), permits plan beneficiaries and

participants to compel recovery of specific benefits due under the terms of a plan. The second category, a claim for breach of fiduciary duty under Section 502(a)(2), provides that a participant or the Secretary may pursue an action to obtain "appropriate relief" under S 409.5 The third category, Section 502(a)(3) is the "catchall" provision, which provides for injunctive or "other appropriate equitable relief " under 502(a)(3) to redress a violation of "any provision of this sub-chapter or the terms of the plan."6 Plaintiffs' requests for remedies for Defendants' alleged breach are brought exclusively under S 502(a)(3). Plaintiffs concede that they have no remedy under sections 502(a)(1) or (a)(2).

[8] The district court declined to allow Plaintiffs to recover their tax benefit losses, holding that lost tax benefits are "extra-contractual" and thus do not fall within "other appropriate equitable relief" available under section 502. See Farr, 815 F. Supp. at 1375-76. During the time that has elapsed since the district court addressed this issue, the Supreme Court has held that the language "appropriate equitable relief" under S 502(a)(3) does not authorize suits for money damages against nonfiduciaries who knowingly participate in a fiduciary's breach of duty. See Mertens v. Hewitt Assocs., 508 U.S. 248, 257-63 (1993). We later held, based on Mertens that monetary relief in the form of compensatory damages is also unavailable under S 502(a)(3) to remedy a fiduciary's breach, finding that "the status of the defendant, whether fiduciary or nonfiduciary, does not affect the question of whether damages constitute `appropriate equitable relief' under S 502(a)(3)." McLeod v. Oregon Lithoprint Inc., 102 F.3d 376, 378 (9th Cir. 1996), cert. denied, 117 S. Ct. 1823 (1997). We further held that "the Varity opinion does not alter the holding in Mertens that compensatory damages are unavailable under S 502(a)(3)." Id. at 379.

[9] Thus, binding precedent compels us to conclude that Plaintiffs may not recover their tax benefit losses under S 502(a)(3), despite the fact that that conclusion leaves Plaintiffs without a remedy for an alleged breach of fiduciary

duty under ERISA. Similarly, Plaintiffs may not recover punitive damages under S 502(a)(3), as we have previously held that S 502(a)(3) does not provide for compensatory or punitive damages. See Concha v. London, 62 F.3d 1493, 1504 (9th Cir. 1995) (citing Mertens, 508 U.S. at 260-63).

[10] Plaintiffs also seek reinstatement with back and front pay. The district court concluded that there is no authority, statutory or otherwise, which would permit a court to provide reinstatement as a remedy for a violation of a breach under S 404 via SS 409 and 502, and that even if there were, reinstatement was not a viable alternative. See Farr , 815 F. Supp. at 1364. Because reinstatement is clearly not a viable alternative in the present case, given the amount of time that has passed since Plaintiffs left the company, we need not decide whether reinstatement would be available under S 502(a)(3). That conclusion, in turn, renders Plaintiffs' request for front and back pay moot. Thus, we affirm the district court's conclusion that reinstatement would not be an appropriate remedy.

In conclusion, although Defendants breached their fiduciary duties to Plaintiffs, Plaintiffs nonetheless are not entitled to any of the remedies they seek under ERISA.

VI.

For the foregoing reasons, we affirm in part and reverse in part the opinion of the district court, and affirm the judgment.

AFFIRMED

NOONAN, Circuit Judge, concurring:

The decision is compelled by Ninth Circuit precedent but I believe we should ask the circuit to take the case en banc and distinguish Mertens, 508 U.S. 248 (1993). Mertens dealt

with damages to be obtained from a non-fiduciary. Id. at 251. When it is a fiduciary that has breached its trust, of course the remedy must be equitable. What else could a court making a trustee true to its trust be doing except providing equitable relief?

If we are unable to do equity here, I agree with Judge Hawkins that Congress should right the wrong.

HAWKINS, Circuit Judge, specially concurring:

The very best thing that can be said about what happened to the U.S. West employees who elected to participate in this early retirement program is that it represented a gross violation of fiduciary duty. U.S. West officials knew there would be significant tax consequences to some of those who elected to receive their benefits in a lump sum. They even talked about it before a televised presentation to employees and affirmatively decided to withhold the information from plan beneficiaries. This left in place an earlier statement from U.S. West that electing lump sum payments might "offer significant tax advantages."

It was particularly important that employees considering early retirement know this information, as the form for electing the program also required an election with respect to lump sum or periodic payment. Employees, in other words, could not elect early retirement and then take some time to seek outside advice whether lump sum or periodic payment made the best economic sense. But these employees were not even told what the phrase "qualifying amount" meant or that amounts that did not "qualify" would be taxed as ordinary income in the year received. One suspects that if the CEO of U.S. West were eligible for this program, he or she would have been told. If fiduciary duty means anything, it is that the information the greatest in a group needs to know must also be told to the least.

In Varity Corp. v. Howe, 116 S. Ct. 1065 (1996), the Supreme Court stated: "it is hard to imagine why Congress would want to immunize breaches of fiduciary obligation that harm individuals by denying injured beneficiaries a remedy." Id. at 1078. Yet that is exactly, according to the Supreme Court interpretation of ERISA S 502(a)(3), 29 U.S.C. S 1132(a)(3), what Congress has done. See Mertens v. Hewitt Assocs., 508 U.S. 248, 255 (1993).

We have faithfully applied Mertens and its restrictive interpretation of S 502(a)(3). See FMC Medical Plans v. Owens, 122 F.3d 1258, 1261 (9th Cir. 1997); McLeod v. Oregon Lithoprint Inc., 46 F.3d 956, 960 (9th Cir. 1995); Waller v. Blue Cross of California, 32 F.3d 1337, 1339 (9th Cir. 1994). Although money damages are available under S 502(a)(3) in the form of restitution, such a remedy does not help Plaintiffs here. I recognize that ERISA is a complex set of interrelated rules that create and also limit beneficiaries' rights and remedies. But as this case so aptly demonstrates, perhaps Congress should rethink the limited remedies provided in S 502 and afford a greater range of relief to beneficiaries when a fiduciary so clearly breaches its duties. the end

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FOOTNOTES

*Honorable Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

1 Section 404(a), as codified in 29 U.S.C. S 1104(a), provides in pertinent part:

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and --

(A) for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims . . . .

2 The district court held that the 5 + 5 program did not constitute a separate "excess benefit plan" exempted from ERISA preemption under 29 U.S.C. S 1002(36). 815 F. Supp. at 1363-64. We agree with the district court that the 5 + 5 program did not constitute a separate "excess benefit plan" under S 1002(36).

3 In its initial grant of summary judgment, the district court indicated that its opinion was also its findings and conclusions, in lieu of a bench trial.

4 Section 415 of the Internal Revenue Code of 1986, 26 U.S.C. S 415 provides the maximum contributions and benefits which may be provided
under retirement plans qualified under 26 U.S.C.S 401(a). The S 415 limits for the pension plan are determined after considering certain contributions which have been made for a participant under other pension plans and any defined contribution plans sponsored by the employer.

5 Section 502(a)(2), as codified in 29 U.S.C. S 1132(a)(2), provides: "(a) Persons empowered to bring a civil action. A civil action may be brought - . . . (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title."

6 Section 502(a)(3), as codified in 29 U.S.C. S 1132(a)(3), provides in pertinent part: "A civil action may be brought -- . . . (3) by a participant, beneficiary, or fiduciary (A) to enjoin any

act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations."

APPENDIX "B"

U.S. 9th Circuit Court of Appeals

DONALD J. FARR; GREGORY H. ISHMIEL; ROD W. TRACY; WILLIS L. RADER; JOSEPH T. DEAN; ROBERT HEUSER; JEANETTE P. NEUFELD, Plaintiffs/Appellants, v. U.S. WEST, INC.; US WEST COMMUNICATIONS, INC.; US WEST MANAGEMENT PENSION PLAN; U.S. WEST EMPLOYEE'S BENEFIT COMMITTEE, Defendants/Appellees.	No. 96-36051 D.C. Nos. CV-91-1186 MA (Lead Case) CV-92-330 MA CV-92-485 MA (Consolidated Cases) ORDER AMENDING OPINION

Filed July 15, 1999

Before: John T. Noonan, Ferdinand F. Fernandez and Michael Daly Hawkins, Circuit Judges.

ORDER

The Opinion appearing at 151 F.3d 908 (9th Cir. 1998), is amended as follows:

Page 915, second column, second full paragraph, lines 9-

10: substitute "backpay and reinstatement or front pay" for "reinstatement with back and front pay."

Page 916, second column, second full paragraph, lines 1-2: substitute "Plaintiffs also seek back pay and reinstatement or front pay until normal retirement age" for "Plaintiffs also seek reinstatement with back and front pay."

Page 916, second column, second full paragraph, lines 15-16: insert footnote call "7" following "That conclusion, in turn, renders Plaintiffs' request for front and back pay moot." On same page insert corresponding footnote as follows:

> 7/ The viability of plaintiffs' requests for back pay in this case is inextricably linked to the viability of their request for reinstatement or front pay as, in effect, the relief here sought is equitable rescission of the agreement to retire. Since the passing of time and the plaintiffs' own admissions establish that rescission is no longer possible, an award of back pay without rescission would not be an equitable remedy in these circumstances. We note, however, that the viability of ERISA claims for lost wages and reinstatement will not always be so linked. See, e.g., Schwartz v. Gregori, 45 F.3d 1017, 1021-23 (6th Cir. 1995) (allowing award of back and front pay as alternative equitable remedy to reinstatement for retaliatory discharge under S 502(a)(3)).

Judge Fernandez does not join.

APPENDIX "C"

FILED
JUL- 9 1999
CATHEY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD J. FARR; GREGORY H. ISHMIEL; ROD W. TRACY; WILLIS L. RADER; JOSEPH T. DEAN; ROBERT HEUSER; JEANETTE P. NEUFELD, Plaintiffs/Appellants, v. U.S. WEST, INC.; US WEST COMMUNICATIONS, INC.; US WEST MANAGEMENT PENSION PLAN; U.S. WEST EMPLOYEE'S BENEFIT COMMITTEE, Defendants/Appellees.	No. 96-36051 D.C. Nos. CV-91-1186 MA (Lead Case) CV-92-330 MA CV-92-485 MA (Consolidated Cases) ORDER

Before: NOONAN, FERNANDEZ and HAWKINS, Circuit Judges.

The mandate that issued on June 15, 1999 is recalled. The panel's Order of June 7, 1999 is withdrawn.

Defendants-Appellees' Motion for Leave to

Supplement Briefing on Rehearing is denied.

The portion of the panel's Order of November 18, 1998, granting Plaintiffs-Appellants' petition for rehearing , is vacated.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc and no judge of the court called for a vote to rehear this matter en banc within the time specified under Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

An "Order Amending Opinion" will be filed separately.

APPENDIX "D"

FILED
NOV 18 1998
CATHEY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD J. FARR; GREGORY H. ISHMIEL; ROD W. TRACY; WILLIS L. RADER; JOSEPH T. DEAN; ROBERT HEUSER; JEANETTE P. NEUFELD,

Plaintiffs/Appellants,

v.

U.S. WEST, INC.; US WEST COMMUNICATIONS, INC.; US WEST MANAGEMENT PENSION PLAN; U.S. WEST EMPLOYEE'S BENEFIT COMMITTEE,

Defendants/Appellees.

No. 96-36051

D.C. Nos.
CV-91-1186 MA
(Lead Case)
CV-92-330 MA
CV-92-485 MA
(Consolidated Cases)

ORDER

Before: NOONAN, FERNADEZ,* and HAWKINS, Circuit Judges.

The panel having been reconstituted, Judges Noonan

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* Judge Fernandez was drawn to replace Judge Robert R. Merhige, Jr., Senior United States District Judge for the Eastern District of Virginia, who retired from the bench.

and Hawkins voting in favor and Judge Fernandez against, the Petition for Rehearing of Plaintiff-Appellants is granted. Within 20 days of the filed date of this Order, the parties shall file simultaneous letter briefs, not to exceed 15 pages, addressed to the following issues:

1. Whether restorative relief, such as a direction to the Plan Administrator to reform the terms of the "5+5" plan by adjusting the discount rate to lessen or eliminate the "excess" tax liability of employees who elected a lump sum (vs. periodic) payment, is consistent with Section 502(a)(3) of ERISA.

2. Whether the Plan Administrator could be required to restore the lump sum electees to their position prior to electing participation in the "5+5" plan.

3. Whether either form of relief would be consistent with Mertens v. Hewitt Assocs., 508 U.S. 248 (1993), and McLeod v. Oregon Lithoprint, Inc., 102 F.3d 376 (9th Cir. 1996), as equitable relief.

Following receipt of the parties' letter briefs, the panel will advise the parties whether further argument is necessary.

(2)

No. 99-664

Supreme Court U.S.
F I L E D
NOV 15 1999
CLERK

IN THE

Supreme Court of the United States

DONALD J. FARR; GREGORY H. ISHMIEL; ROD W. TRACY; WILLIS L. RADER; JOSEPH T. DEAN; ROBERT HEUSER and JEANETTE P. NEUFELD,

Petitioners,

v.

U S WEST, INC.; U S WEST MANAGEMENT PENSION PLAN and U S WEST COMMUNICATIONS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents describe the questions presented by Petitioners' Petition for Writ of Certiorari (the "Petition") as follows:

Question One

Whether in the absence of any Circuit conflict this Court should review the Ninth Circuit's holding that back pay and/or front pay are not forms of "appropriate equitable relief" under ERISA Section 502(a)(3) (29 U.S.C. § 1132(a)(3)) for participants whose lump sum retirement benefits were partially subject to immediate taxation as a result of a breach of fiduciary duty.[1]

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1. The Ninth Circuit panel, in its 1998 order, reversed the District Court's finding that no fiduciary breach had occurred. The panel made its own factual finding that Respondents had made deliberate misrepresentations, which finding was completely contradictory to an express finding of the District Court. The panel's conclusions on the issues raised by the Petition would be mere *obiter dicta* but for that finding. The panel had no power to set aside the District Court's findings of fact unless it determined that they were unsupported by the record (which was manifestly not the case). *See Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1095 (9th Cir. 1999) (*en banc*), *cert. denied*, 68 U.S.L.W. 3109 (U.S. Nov. 1, 1999). Respondents urge this Court not to accept for review the issues raised by Petitioners unless it also grants review of the standard of review applied by the panel to the District Court's finding that there was no breach of fiduciary duty. Accordingly, Respondents are filing simultaneously with this Brief a Conditional Cross-Petition for Writ of Certiorari pursuant to United States Supreme Court Rule 12.5.

Question Two

Whether in the absence of any Circuit conflict this Court should review the Ninth Circuit's holding that reformation and/or rescission are not forms of "appropriate equitable relief" under ERISA Section 502(a)(3) (29 U.S.C. § 1132(a)(3)) under the facts of this case.

Question Three

Whether in the absence of any Circuit conflict this Court should review the Ninth Circuit's application of *Mertens v. Hewitt Assocs.*, 508 U.S. 428 (1993), to plan fiduciaries sued by plan participants for individual relief solely under ERISA Section 502(a)(3) (29 U.S.C. § 1132(a)(3)).

Question Four

Whether in the absence of any Circuit conflict this Court should review the Ninth Circuit's holding that ERISA preempts state law claims of breach of fiduciary duty based on an alleged misrepresentation by plan officials to plan participants in connection with the participants' selection of plan benefits.

STATEMENT PURSUANT TO RULE 29.6

Respondent, U S WEST Communications, Inc., is a wholly owned subsidiary of U S WEST, Inc. Respondent U S WEST, Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

Respondents concur with Petitioner's description (Petition at 1) of the opinions below, except add that the District Court issued an unreported Opinion and Order on September 3, 1996, reaffirming its entry of judgment for Respondents. The September 3, 1996 Opinion and Order is attached to the Conditional-Cross Petition filed by the Respondents at pages 1a-13a.

STATEMENT OF JURISDICTION

The District Court had jurisdiction over this case pursuant to Section 502(e)(1) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") (29 U.S.C. § 1132(e)(1)) and 28 U.S.C. § 1331. The Court of Appeals had jurisdiction over this case pursuant to 28 U.S.C. § 1291. This Court has jurisdiction to consider the Petition pursuant to 28 U.S.C. § 1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

Questions One through Three present issues arising out of ERISA Sections 409 and 502 (29 U.S.C. §§ 1109 and 1132).

ERISA Section 409 (29 U.S.C. § 1109) provides, in relevant part:

> (a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan

> resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

ERISA Section 502 (29 U.S.C. § 1132) provides, in relevant part:

> (a) A civil action may be brought (1) by a participant or beneficiary (A) for the relief provided for in subsection (c) of this section, or (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title; (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) *to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan* . . .

(emphasis added).

Question Four presents issues arising out of ERISA Section 514(a) (29 U.S.C. § 1144(a)), which provides in relevant part:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and

subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

STATEMENT OF THE CASE

A. Introduction

Petitioners are former managers at U S WEST Communications, Inc. ("Communications"), a subsidiary of U S WEST, Inc. ("U S WEST"). They are former participants in the U S WEST Management Pension Plan (the "Plan") who voluntarily retired in 1990 pursuant to an early retirement incentive program under the Plan known as "5+5". The 5+5 program granted an extra 5 years of service credit and 5 years of age credit to eligible managers, and offered additional benefits to those who elected early retirement under the Plan during a "window period." The program was designed to induce a reduction in the management-level work force at U S WEST and Communications in a dignified manner, by dramatically increasing the pension benefits of those who elected the early retirement option. Managers retiring under 5+5 could elect to receive benefits in the form of an annuity or in an actuarially equivalent lump sum (i.e., the present value of the future annuity payments). Petitioners each elected to retire under 5+5, and chose the lump sum.

This dispute arose because the lump sum pension benefits Petitioners received under 5+5 (ranging from $275,000 to $530,000), combined with the other retirement benefits U S WEST provided, were so substantial that a

portion exceeded the distribution limitations imposed by Internal Revenue Code (26 U.S.C.; hereinafter, the "Code") Section 415 on "qualified" retirement plans, such as the Plan. Thus, although Petitioners were paid their entire benefit, the Code precluded them from "rolling over" the "excess" or "non-qualified" portion of their lump sum on a tax-deferred basis into an individual retirement account ("IRA"), and required them to pay income tax immediately on that portion. (Had Petitioners chosen annuities, taxes would have been deferred (not avoided) until distribution of annuity payments to them.) When the Plan administrator, the U S WEST, Inc. Employees' Benefit Committee ("EBC"), became aware of this impact on participants who (like Petitioners) elected lump sums, it reduced the discount rate for the "non-qualified" benefits, thus producing a substantially larger lump sum benefit than Petitioners would have otherwise received. The EBC believed, based on independent actuarial advice, that this adjustment would make Petitioners actuarially whole.[2]

Nevertheless, Petitioners made claims with the EBC and thereafter in court, seeking reimbursement for taxes they had to pay on the non-qualified or "excess" portion of their lump sums, and asking Respondents to pay their federal and state income taxes on the earnings on the excess benefits for the rest of their lives. Significantly, Petitioners did not seek to convert their lump sums back into annuities (thereby avoiding immediate taxation), or to rescind their retirements under the 5+5 program. Thus, Petitioners desired to retain

2. The Ninth Circuit did not disturb the District Court's factual findings that the actuary's advice was "reasonable under the circumstances and proper," and that using a lower discount rate "compensated for [Petitioners'] losses on the future income stream." 815 F. Supp. 1364, 1374 (D. Or. 1992).

the benefits of their 5+5 lump sums, but to have Respondents pay the taxes that had been accelerated due to Section 415 — even though Petitioners have never disputed that those taxes would ultimately have been their responsibility to pay as taxpayers.

B. Statement of Facts

1. *The Plan and Its Administration*

The Plan [3] is a tax-qualified defined benefit pension plan pursuant to Code Section 401(a) (26 U.S.C. § 401(a)) and ERISA Sections 3(2) and (35) (29 U.S.C. §§ 1002(2) and (35)). The requirements that a plan must meet to remain tax-qualified under Code Section 401(a) include ensuring that the benefits paid to individual participants do not exceed the limitations described in Section 415. Code § 415(a). Benefits paid under a plan that would exceed the Section 415 limitations are called "non-qualified" or "excess" benefits.

U S WEST is the "plan sponsor" of the Plan, as defined in ERISA Section 3(16)(B) (29 U.S.C. § 1002(16)(B)), and a "named fiduciary" as defined in ERISA Section 3(21) (29 U.S.C. § 1002(21)). Communications helps fund the Plan, provides ministerial help to the EBC and, at EBC direction, pays from corporate assets Plan benefits that exceed the Section 415 limitations. The EBC is the named fiduciary responsible for Plan operations and administration; for

3. The Plan, which covered only managers, merged with the U S WEST Pension Plan, which had covered non-managers, effective in 1993. The surviving entity, the U S WEST Pension Plan, has continued to feature materially the same operative terms, language, and administrative structure during the pendency of this case.

example, it decides claims, exercises discretion in interpreting Plan terms, ensures compliance with reporting and disclosure laws, and administers the excess benefit provision.

C. The Plan's Excess Benefit Provision and Its Administration

Paragraph 4.9 of the Plan provided:

> The portion of any pension or survivor annuity with respect to any participant in excess of the applicable [Code Section 415 limit] shall be paid by the Participating Company which last employed such participant, directly to the participant or beneficiary entitled thereto and shall be charged to its operating expense accounts when and as paid.

The EBC administers this provision as part of Plan administration. It determines the total benefits payable to a retiring participant and which of those benefits (if any) must, under Section 415 of the Code and paragraph 4.9 of the Plan, be paid as excess benefits. If excess benefits are payable, it decides which U S WEST company is to be charged and determines the amount to pay. The only roles played by the U S WEST companies with respect to excess benefit distributions are (1) to issue checks as directed by the EBC and (2) to report the excess benefit amounts to the State and Federal Governments for income tax purposes.

D. Disclosure of Possibility of Excess Benefit Distributions

The EBC issued a restated summary plan description ("SPD") for the Plan on July 1, 1989, and mailed it to all participants several months before the 5+5 offering. The SPD advised that Plan benefits could exceed legal limits on qualified distributions and that excess benefits could not be paid from the Plan's trust, but that the companies' intent (subject to change) was to pay any excess benefits from operating assets. This statement confirmed an earlier notice mailed to all participants in 1987.

E. Differences Between Qualified and Excess Benefit Distributions

The Section 415 limitations do not have any impact on a distribution that takes the form of an annuity, even if it includes excess as well as qualified benefits. Annuity payments are taxable as personal income when and as received. Qualified and excess *lump sum* benefits are both taxable, but they are given different tax treatment regarding whether the tax can be deferred. Under applicable tax law, excess lump sum benefits cannot be "rolled over" into IRAs and are subject to immediate taxation. Qualified benefits can be "rolled over" into an IRA or another qualified plan. If so rolled, the benefits are eligible for continued income tax deferral, rather than subject automatically to immediate taxation. Qualified benefits are then taxed when paid to the participant.

F. The 5+5 Plan Amendment

Before January 1, 1990, the Plan paid benefits (except those in *de minimis* amounts) in the form of an annuity only. On November 29, 1989, U S WEST's Board of Directors authorized the EBC to adopt an amendment that would add five years of age credit and five years of service credit for purposes of calculating Plan benefits for eligible employees. In addition, the amendment was to offer such employees an election in January 1990 to retire with numerous other pension enhancements and to elect to receive these benefits in lump sum form. The EBC adopted the "5+5" Amendment effective January 1, 1990, selecting an 8% discount rate for valuing the lump sum option. (The higher the discount rate, the lower the lump sum.)

Once made, elections to retire under 5+5 were irrevocable. All seven Petitioners elected in January 1990 to retire under 5+5, and chose lump sum benefits in lieu of an annuity.

G. Why the 5+5 Materials Did Not Specifically Address Excess Benefit Issues

The EBC was responsible for the content of all information provided to employees about 5+5. The EBC explained 5+5 primarily in a Bulletin supplementing the SPD that was mailed on or about December 18, 1989 to participants eligible for 5+5, including Petitioners. The Bulletin contained a brief, general summary of the lump sum distribution option, and described generally the rules most likely to affect the bulk of eligible participants, such as the ability to "roll over" all or part of a lump sum distribution on a tax deferred basis to an IRA. Appropriately, the Bulletin did not purport to give tax advice. Instead, it informed eligible participants that the tax issues

related to the election were complex, and advised them to review their SPD and to secure advice about the tax effects of 5+5 distributions from professionals.

The U S WEST Pension Staff, under the direction of the EBC, prepared the SPD and the Bulletin. Although some Pension Staff members were aware that some eligible employees might, if they elected 5+5, receive benefits that exceeded the Section 415 limits, the Bulletin did not address this issue, for several reasons.

First, because the purpose of the Bulletin was to supplement rather than restate the SPD, the Bulletin advised employees what was new in 5+5 and directed them to review the SPD – which described the effect of the Section 415 limitations — before making their 5+5 election. Second, the Pension Staff believed that, among some 6,000 eligible participants, the number whose benefits would exceed the limits was insignificant, that the amount of any excess benefits would also be insignificant, and that most employees electing 5+5 would apply for benefits in annuity form (making the differences between qualified and excess benefits irrelevant). This was balanced against the concern that raising the Section 415 issue (which would apply to few participants) would confuse all participants because of its complexity. Thus, the staff rationally concluded that expressly notifying eligible participants to seek tax advice from tax professionals, on balance, provided the most useful notice to all of the participants who received the Bulletin. Third, the Pension Staff sent participants, along with the Bulletin, Statements of Estimated Benefits that were expected to alert professional advisers to any possible Section 415 issue.

H. The EBC's Discovery Of and Action to Remedy the Excess Benefit Problem

In late January 1990, shortly before the election "window" period closed, the Plan's actuary reported that he had spoken with a participant whose 5+5 lump sum benefit would substantially exceed the Section 415 limits. This suggested that Section 415 issues might be more significant than the Pension Staff had anticipated when it sent the Bulletin. The actuary proposed lowering the discount rate on the excess benefits from 8% to 5.5% or 6% as a solution. According to the independent actuary, using a 5.5% to 6% discount rate — which would increase the amount of excess benefits — would offset the effect of immediate taxability of those benefits. The EBC accepted the actuary's advice, but decided to use a lower, 5.25% discount rate, thus increasing the benefits payable even more than the independent actuary had suggested. The District Court found (and the Ninth Circuit did not disturb this finding) that the EBC's action in this regard "compensated for the losses on the future income stream" caused by the acceleration of tax. 815 F. Supp. at 1374.

I. Notices to Participants About the Excess Benefit Problem

The Pension Staff, pursuant to EBC direction, notified the affected group of the amounts of their qualified and excess distributions and told them how the EBC had increased their benefits to offset the impact of Section 415. The benefits were then distributed.

A number of participants, including several of the Petitioners, called the Pension Staff to complain about their unanticipated immediate tax liability. Some pursued claims under the Plan's claims review procedure. Although the claimants asserted that the EBC's action (of lowering the discount rate) had not made them whole, none argued that the EBC acted unreasonably in adopting the 5.25% discount rate or that this rate did not produce an after-tax benefit that was actuarially equivalent to (or better than) the benefit they had expected to receive. The EBC had guidelines for allowing a participant to change a lump sum election to an annuity election (and thereby avoid immediate taxation), or to rescind the 5+5 election and return to work, but none of the 5+5 participants who received excess benefits asked for such relief. Instead, Petitioners demanded that the EBC and/or their employer pay immediately the federal and state income taxes they owed as taxpayers on the excess benefits, and also pay their taxes on the earnings thereon for the rest of their lives. The EBC denied these claims.

J. Course of Proceedings Below

Petitioners filed suit in state court alleging fraud and other state law claims. After Respondents removed the case to the District Court and remand was denied, Petitioners added a claim under ERISA Section 502(a)(3) for breach of fiduciary duty. In August, 1992, the District Court held that ERISA preempted the state law claims. 815 F. Supp. 1360 (D. Or. 1992). Following extensive discovery, the parties filed cross-motions for summary judgment based on a stipulated factual record. The District Court treated the motions as a bench trial on a stipulated record, 151 F.3d at 913 n.3; 815 F. Supp. at 1369, and proceeded to make findings of fact and conclusions of law and to enter judgment for Respondents. In December, 1992, the District

Court found that there had been no breach of fiduciary duty, and also held that Petitioners had not stated a claim for which relief was available under ERISA. 815 F. Supp. 1364 (D. Or. 1992). The Ninth Circuit reversed on the preemption issue, but affirmed the ruling that ERISA Section 502(a)(3) (29 U.S.C. § 1132(a)(3)) did not afford individual relief to Petitioners. 58 F.3d 1361 (9th Cir. 1995). In the 1995 appeal, the Ninth Circuit did not consider whether Respondents breached any fiduciary duties under ERISA. 58 F.3d at 1363-64 n.1.

On remand, the parties again filed cross-motions for summary judgment on the same stipulated record, addressing the impact of this Court's intervening decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996). The District Court again entered judgment for Respondents. Opinion and Order (filed Sept. 3, 1996), App. 13a. It held that Petitioners' state law claims were preempted in light of *Varity*, and reaffirmed its 1992 finding that Respondents did not breach any fiduciary duty.

On Petitioners' second appeal, applying a *de novo* standard to the District Court's factual findings, the Ninth Circuit panel found that Respondents breached their fiduciary duty to Petitioners, but affirmed because ERISA preempted Petitioners' state law claims and did not allow Petitioners to recover any of the relief they sought. 151 F.3d 908 (9th Cir. 1998), *amended*, 179 F.3d 1252 (9th Cir. 1999). In the course of reversing the District Court on the merits, the 1998 panel (disregarding the District Court's factual findings) found that Respondents had deliberately misled Petitioners.[4] Two of

4. This finding was completely contradictory to an express finding of the District Court. As discussed fully in Respondents' Conditional Cross-Petition for Writ of *Certiorari* filed herewith, (Cont'd)

the members of the panel then wrote opinions commenting on the restrictions imposed by *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255, 262 (1993), on ERISA remedies and suggesting that the law should be changed — by Congress according to Judge Hawkins, or by the Ninth Circuit sitting *en banc* according to Judge Noonan. Judges Hawkins and Noonan then voted to rehear the case and requested extensive briefing by the parties on remedies issues — including the possible use of reformation (rewriting the Plan) and/or rescission (allowing Petitioners to return their lump sum benefits and awarding them back pay and either front pay or reinstatement). The parties filed letter briefs addressing these issues. Respondents also moved for leave to supplement the briefing on the issue of whether the panel had applied the wrong standard of review, and usurped the District Court's role by making findings of fact in conflict with the District Court's finding on the issue of fiduciary breach.

The panel ultimately rescinded the order granting rehearing, denied the motion for leave to supplement, denied rehearing, rejected the suggestion for rehearing *en banc*, and issued an amended order. In a footnote to the amended order, the panel stated that the requested award of back pay was denied because it was "inextricably linked" to Petitioners' demand for equitable rescission of their retirement agreements, and that rescission would not be equitable in

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(Cont'd)
the panel had no power to set aside the District Court's findings of fact unless it determined that they were unsupported by the record (which was manifestly not the case). *See Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1095 (9th Cir. 1999) (*en banc*), *cert. denied*, 68 U.S.L.W. 3109 (U.S. Nov. 1, 1999). This Court should not accept for review the issues raised by Petitioners unless it agrees also to review the standard of review applied by the panel.

this case given "the passage of time and the Petitioners' own admissions." Citing *Schwartz v. Gregori*, 45 F.3d 1017 (6th Cir. 1995), *cert. denied*, 116 S. Ct. 77 (1995), however, the panel suggested that such relief may be appropriate in some other ERISA cases. Thus, the panel limited its conclusion that Petitioners are not entitled to any equitable relief to the particular facts of this case.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE AVAILABILITY OF BACK AND FRONT PAY AS A REMEDY FOR FIDUCIARY BREACH OR ON THE DENIAL OF SUCH A REMEDY ON THE FACTS PRESENTED

Petitioners correctly note that the Ninth Circuit in this case held that back pay without rescission was not "an equitable remedy in these circumstances." Petition at 9 and Appendix at 19 (July 15, 1999 Order of Ninth Circuit). There was in fact abundant support for the panel's conclusion that under the facts before it — specifically "the passing of time and the plaintiffs' own admissions" — back pay without rescission was not an equitable remedy "*in these circumstances*." Petition, Appendix at 19 (July 15, 1999 Order of Ninth Circuit at n.7) (emphasis added). Petitioners did not seek in 1990 (when reinstatement would have feasible) to rescind their retirements — *i.e.*, to give back their qualified and excess distributions and return to work. Instead, they asked Respondents to pay their taxes (even though paying the taxes was their responsibility as taxpayers and their dispute was only about the acceleration of the taxes). Indeed, they did not ask to change their 5+5

distribution from a lump sum to an annuity — a request that the EBC would have granted in 1990. Moreover, there has never been any factual showing that Petitioners' jobs even existed at any time after they retired under 5+5 — which was, after all, part of a company-wide reduction in force. Further, in their brief to the Ninth Circuit in the first appeal, Petitioners conceded that the passage of time made reinstatement unfeasible. In fact, *in their letter brief to the panel Petitioners stated that they did not want to rescind their retirements to the extent that required returning the distribution money*. Throughout this litigation Petitioners manifestly preferred the distributions they received — lump sum distributions that included enhanced excess benefits — to rescission. In such circumstances, rescission would not be equitable.

Petitioners make the astonishing assertion that the panel "specifically noted" that its decision conflicted with the Sixth Circuit's decision in *Schwartz v. Gregori*, 45 F.3d 1017, 1022-23 (6th Cir. 1995). The panel did no such thing. It noted the *Schwartz v. Gregori* decision, but did not describe that decision as being in "conflict" with its own decision in any way. Rather, as the panel correctly noted, the facts of *Schwartz* — a retaliatory discharge case brought under ERISA Section 510 (29 U.S.C. § 1140) — were dramatically different from those presented here.

There is no conflict among the Circuits on the availability of back and front pay as equitable relief for breaches of ERISA's fiduciary duties. Moreover, the panel decided this issue correctly on the facts before it. The Petition should be denied as to Question One.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE "REFORMATION" ISSUE, WHICH THE NINTH CIRCUIT CORRECTLY DECIDED

Petitioners' second issue relates to the "availability of restorative relief including reformation of the ERISA plan as a form of equitable relief." Petition at 15. As Petitioners note, the Ninth Circuit panel that decided this case requested further briefing on this issue before eventually affirming the judgment for Respondents. Petitioners complain that the panel affirmed without making any "specific comment" on this issue, and request this Court's "guidance" to "ensure uniform standards among the Circuits." Petition at 15.[5]

Again, Petitioners do not demonstrate the existence of any Circuit conflict on this issue, or that this issue presents an important question of law that this Court should decide. Moreover, *Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991) (Petition at 15), is not in conflict with the decision in this case. There, the court ordered that a summary plan description be modified to reflect the parties' actual agreement reached in collective bargaining as to the continuation of a retirement insurance program. Thus, the only situation the parties are aware of where plan reformation has been approved is where a plan document did not accurately reflect the intent of the parties. That is nothing like this case. There is no dispute about what the 5+5 program meant or said. What Petitioners requested in their letter briefs was not a "reformation" of the 5+5 Bulletin to make it

5. It is noteworthy that Petitioners did not seek this type of relief in their administrative claims, in their Complaint, or during seven years of litigation. They did not seek reformation until the panel asked about it in November, 1998.

comport with any agreement between them and Respondents. Rather, what they requested — and the panel rejected — was that the unambiguous terms of the Plan be rewritten to afford them a benefit to which they were never entitled under its terms. Neither Petitioners nor the panel have any quarrel with the District Court's finding that Petitioners "have been paid all the benefits provided under the 5+5 plan formula." 815 F. Supp. at 1371.

The law is not in conflict on this point. This Court has been very clear that the federal courts lack jurisdiction to "reform" the terms of employee benefit plans as a means of addressing purported fiduciary breaches, because creating, amending, and terminating plans is not a fiduciary but a settlor function. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995). The Circuits have unanimously followed this Court's direction. *Akers v. Palmer*, 71 F.3d 226 (6th Cir. 1995), *cert. denied*, 517 U.S. 1004 (1996); *Waller v. Blue Cross*, 32 F.3d 1337 (9th Cir. 1994); *Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506 (5th Cir. 1994); *Malia v. General Elec. Co.*, 23 F.3d 828 (3d Cir. 1994), *cert. denied*, 513 U.S. 956 (1994); *Hickman v. Tosco Corp.*, 840 F.2d 564 (8th Cir. 1988); *Phillips v. Amoco Oil Co.*, 799 F.2d 1464 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987); *Amato v. Western Union Int'l Inc.*, 773 F.2d 1402 (2d Cir. 1985); *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1274 (7th Cir. 1985); *Sutton v. Weirton Steel Div. of Nat'l Steel Corp.*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984).

Thus, there is no conflict on Petitioners' second issue, which the panel decided correctly. The Petition should be denied as to Question Two.

III. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE APPLICATION OF *MERTENS* TO ALLEGED FIDUCIARY BREACHES

Petitioners' third question apparently asks the Court to decide whether the carefully constructed legislative limitation on ERISA Section 502(a)(3) remedies to "appropriate equitable relief," as explained in *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 255, 262 (1993), should be applied differently where the defendants are ERISA fiduciaries rather than nonfiduciaries. Petitioners present no basis — other than their dissatisfaction with the panel's judgment against them — for this Court to reach this issue. As with Petitioners' other "issues," they do not demonstrate the existence of any conflict among the Circuits on this point, or show that a question of law exists of such national importance that this Court should resolve it. In fact, the courts uniformly have concluded (as did the Ninth Circuit panel here) that *Mertens* limits the relief available under ERISA to traditional equitable remedies regardless of the defendant's status as a fiduciary or nonfiduciary. *See, e.g., Turner v. Fallon Community Health Plan, Inc.*, 127 F.3d 196 (1st Cir. 1997); *Buckley Dement, Inc. v. Travelers Plan Admin.*, 39 F.3d 784 (7th Cir. 1994); *McLeod v. Oregon Lithoprint*, 102 F.3d 376 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1823 (1997); *Slice v. Sons of Norway*, 34 F.3d 630 (8th Cir. 1994).

Thus, there is no conflict among the Circuits on this issue, and the Ninth Circuit decided it correctly. The Petition should be denied as to Question Three.

IV. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE ERISA PREEMPTION ISSUE

Petitioners argue, finally, that because the Ninth Circuit's 1995 decision found no ERISA preemption of their claims, and the 1998 decision found their claims preempted, there is "confusion" on the issue of ERISA preemption, requiring this Court's guidance. Petition at 16-17. Again, Petitioners point to no conflicting decisions among the Circuits on the scope of ERISA preemption (in the context of this case) after this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996). Moreover, the difference between the Ninth Circuit's 1995 and 1998 decisions, about which Petitioners complain, is entirely consistent with the fact that this Court's decision in *Varity* was issued after the 1995 decision and properly guided the Ninth Circuit's 1998 decision.

Varity established the contours of "fiduciary" conduct and explained with clarity that conduct is fiduciary in nature if it involves the administration of an employee benefit plan. In *Varity*, petitioners claimed that their employer fraudulently told them that their employee benefits would be secure if they transferred their employment to a new subsidiary. This Court held that although the statements at issue were not ERISA-required disclosures and instead related to Varity's intent — as employer, and not as a fiduciary — to continue the plans, Varity was acting as both employer and fiduciary when it made those statements. The Court reasoned that conduct of an employer-administrator is fiduciary in nature if it is " 'appropriate' to carrying out an important plan purpose" such as providing detailed information to help beneficiaries "decide whether to remain with the plan."

As the Ninth Circuit quite properly recognized in its 1998 decision, *Varity*'s test for fiduciary conduct undermined the preemption analysis of the 1995 decision, requiring the District Court and the Ninth Circuit to find Petitioners' claims preempted. "Under the [Supreme] Court's reasoning in *Varity*, the tax consequences of [5+5] clearly 'relate to' plan administration because they are part of the overall mix of information relied upon by [Petitioners] in making their decisions to participate in [5+5]." 151 F.3d at 913 (Appendix to Petition at 7). Accordingly, the Ninth Circuit affirmed the District Court's finding that Petitioners' state law claims were preempted. That holding was correct, because U S WEST's alleged misrepresentation gave Petitioners information relating to their decision whether to accept enhanced retirement under 5+5. The conduct was plainly in furtherance of an "important plan purpose" and arose out of Plan administration.

Thus, there is no conflict on Petitioners' fourth issue, which the Ninth Circuit decided correctly. The Petition should be denied as to Question Four.

CONCLUSION

The Petition presents no real ground for this Court to expend its limited resources reviewing the issues Petitioners raise. There is no conflict among the Circuits on any of these issues. This case is limited to its facts and raises no issue of national importance to warrant a grant of *certiorari*. Moreover, the Ninth Circuit's ruling on the issues raised by the Petition was consistent with this Court's settled precedent. The Petition should be denied.

Respectfully submitted,

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